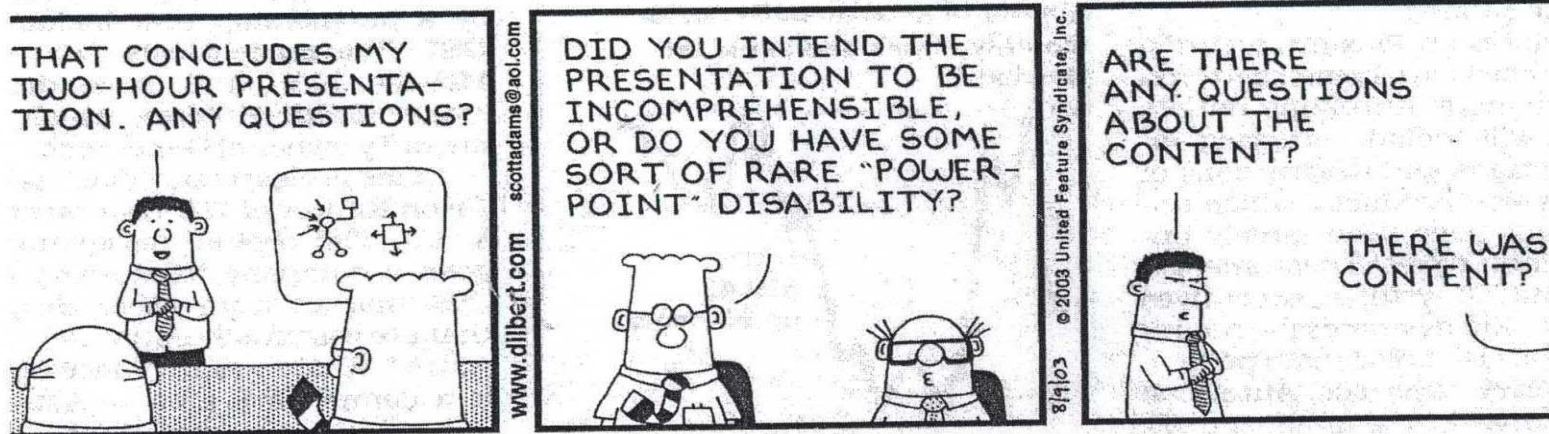


CIVIL REMEDIES



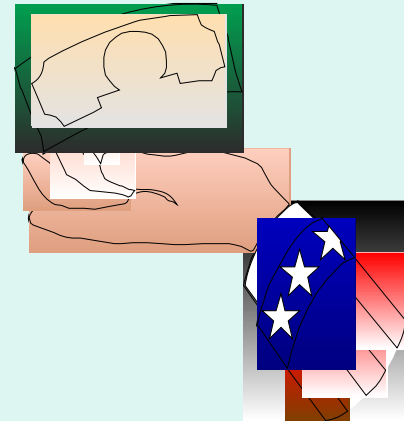
Paula Newett, Acting Deputy Chief, USAO Alexandria
Eileen Foust, Forensic Auditor
Melinda Johnson, ACE Paralegal

CIVIL REMEDIES



CIVIL REMEDIES

- I. **What Is Affirmative Civil Enforcement (ACE)**
 - A. **Fraud fighting weapon**
 - B. **Recover damages to make government whole**
 - C. **Impose penalties**



CIVIL REMEDIES

II. Why ACE?

A. Critical to Law Enforcement

- 1. Criminal remedies not always appropriate**
- 2. Lower burden of proof (Preponderance of evidence)**
- 3. Deterrent**
- 4. Targets incentive for fraud**
- 5. Specific intent not required**
- 6. Different statute of limitations**

CIVIL REMEDIES

II. Why ACE? (cont.)

B. Need for Coordination

- 1. Coordinate all remedies**
- 2. Civil versus criminal discovery**
- 3. Collateral estoppel effect of criminal conviction**

CIVIL REMEDIES

III. Civil – Criminal Coordination

A. Related Criminal Statutes

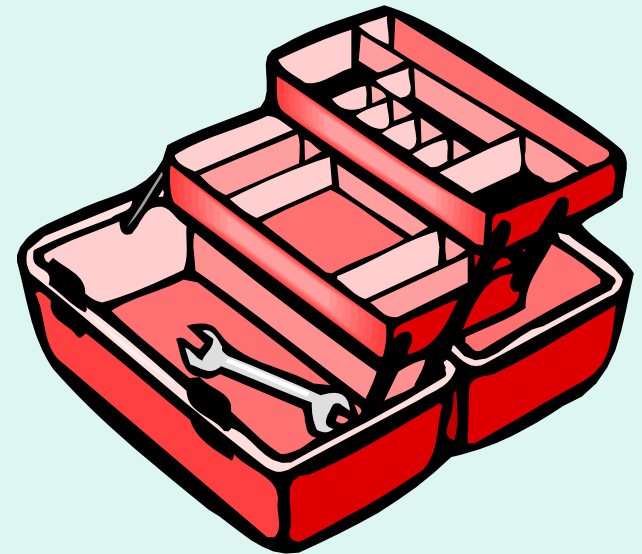
- 1. 18 U.S.C. § 286 – conspiracy to file false claims.**
- 2. 18 U.S.C. § 287- filing false claims.**
- 3. 18 U.S.C. § 371 – conspiracy to defraud the U.S.**
- 4. 18 U.S.C. § 1001 – use of false statements.**
- 5. 18 U.S.C. § 207 – employment restrictions.**

CIVIL REMEDIES

III. Civil – Criminal Coordination (cont.)

B. Primary ACE
enforcement tool – The
False Claims Act - 31
U.S.C. § § 3729 – 3733

1. Powerful tool
2. Triple damages
3. \$5,500 - \$11,000
civil penalty per
claim



CIVIL REMEDIES

III. Civil – Criminal Coordination (cont.)

c. Other ACE Enforcement Tools

1. 18 U.S.C. § 1345 – Fraud Injunctive Statute

- **Assets may be frozen by an injunction in cases involving ongoing mail, wire, and bank frauds**

2. 12 U.S.C. § 1715z-4a – Diversion of Funds from HUD Multi-family Housing Projects

- **Double damages for improper use of HUD funds**

CIVIL REMEDIES

III. Civil – Criminal Coordination (cont.)

C. Other ACE Enforcement Tools (cont.)

3. 18 U.S.C. § § 215, 656, 657, 1005, 1007, 1014, and 1344 – Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)

- **Civil penalties for bank fraud**

4. 18 U.S.C. § 216 – Bribery and conflict of interest

- **\$50,000 civil penalty for each violation of the criminal bribery statutes**

CIVIL REMEDIES

III. Civil – Criminal Coordination (cont.)

C. Other ACE Enforcement Tools (cont.)

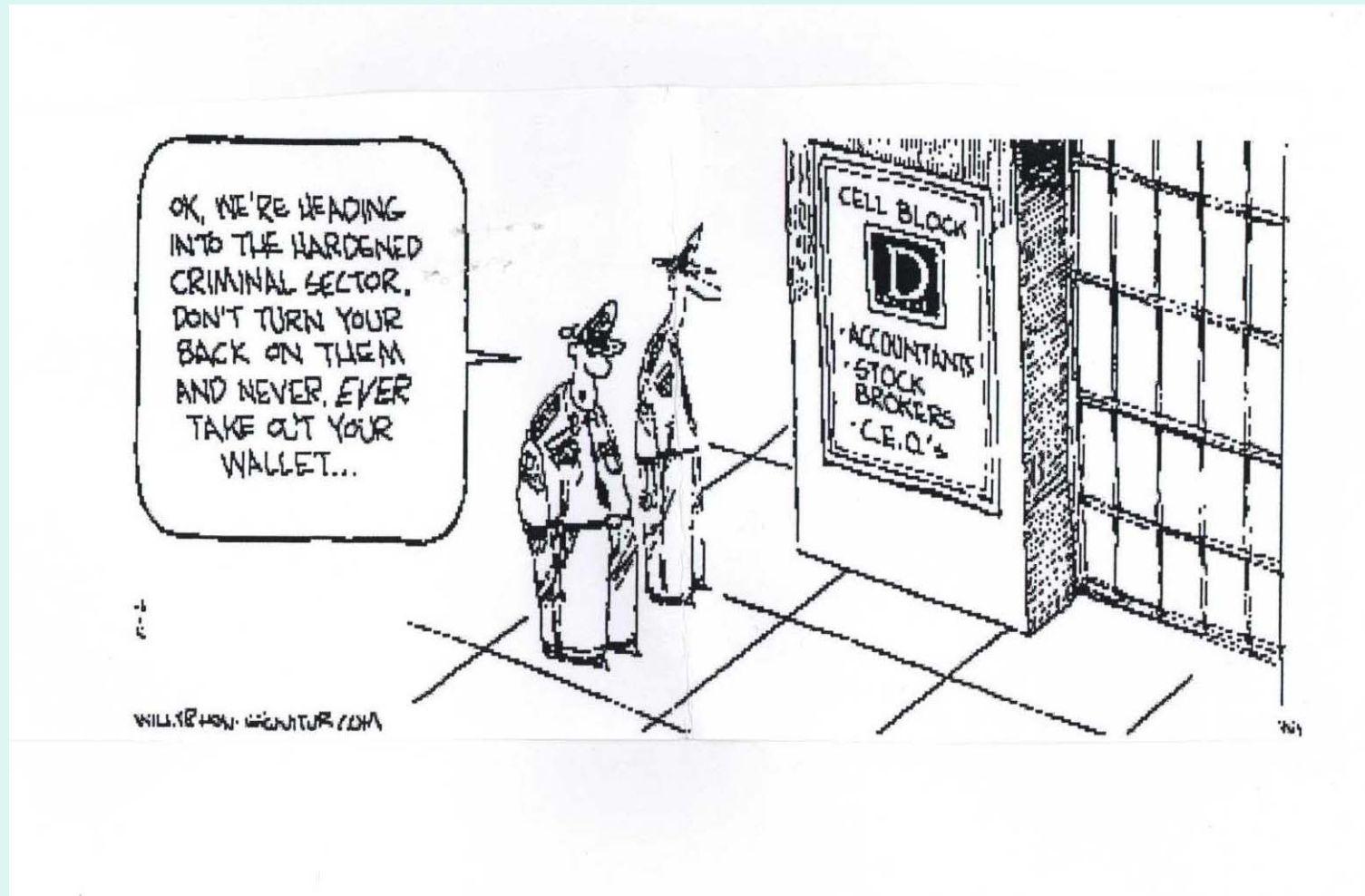
5. 41 U.S.C. § § 51- 58 – Anti Kickback Act

a. Double Damages plus \$10,000 penalty

b. Prohibits payments for purpose of receiving any favorable treatment in connection with government contracts.



CIVIL REMEDIES



CIVIL REMEDIES

IV. False Claims Act (FCA) Overview

A. FCA provides for recovery of damages and civil penalties against anyone who submits a false claim, causes a false claim to be submitted, or makes a false statement to the government.

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

B. 31 U.S.C. § 3729(a) imposes civil fraud liabilities on “persons”

- 1. individuals**
- 2. corporations**
- 3. partnerships**
- 4. companies**
- 5. associations**
- 6. firms**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

C. A “claim” includes any request or demand whether under contract or other wise

- for money or property which is made to a contractor, grantee or other recipient**
- If the U.S. Government provides any portion of the money or property which is requested or demanded; OR**
- If the U.S. Government will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded. 31 U.S.C. § 3729(c)**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

D. A claim includes, inter alia:

- 1. Invoices for payment**
- 2. Request for Progress payments**
- 3. Incurred Cost Submissions**
- 4. Loan applications**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

E. Examples of acts which may constitute false claims

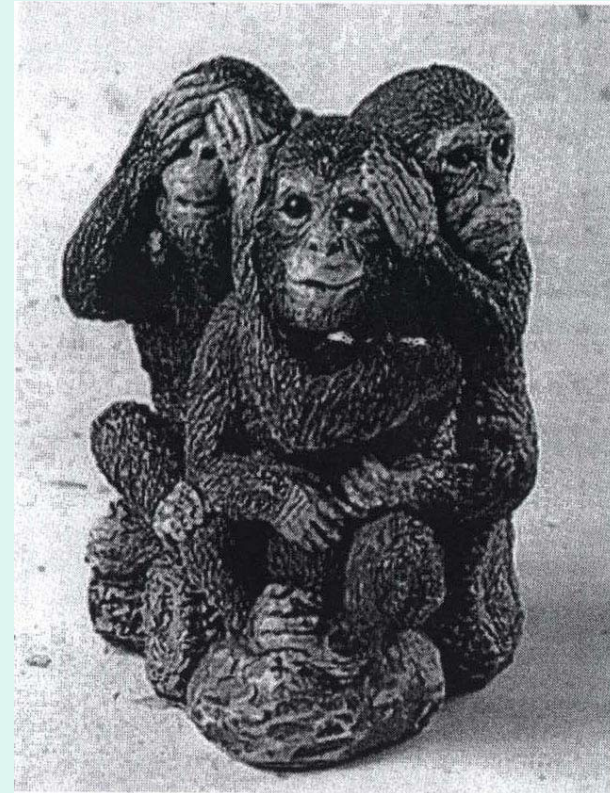
- 1. Submitting false claims for payment (a)(1)**
 - a. Billing/invoicing for services not rendered**
 - b. “Marking” up claim for payment**
- 2. Making false statement to get false claim paid (a)(2)**
 - a. Making false statement on loan application**
 - b. Noncompliance with statement made in response to a request for proposal**
- 3. Submitting false claim to decrease payment owed government (a)(7)**
 - a. Reducing refunds of progress payments**
 - b. Reducing funds owed in educational grants**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

F. Knowing and knowingly means that a person, with respect to information

- 1. Has actual knowledge of the information**
- 2. Acts in deliberate ignorance of the truth or falsity of the information; or**
- 3. Acts in reckless disregard of the truth or falsity of the information**



CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

F. Knowing and knowingly (cont.)

- No proof of specific intent to defraud is required.**
- The claim or statement must be false in a material respect.**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

G. The statute of limitations on FCA expires

**1. Six (6) years after the violation occurs
or**

**2. Three years after the violation but not
more than 10 years after the violation
occurred.**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

H. Damages

1. Treble actual damages

a. Restitution

b. Voluntary Disclosure

c. No Consequential damages under FCA

CIVIL REMEDIES

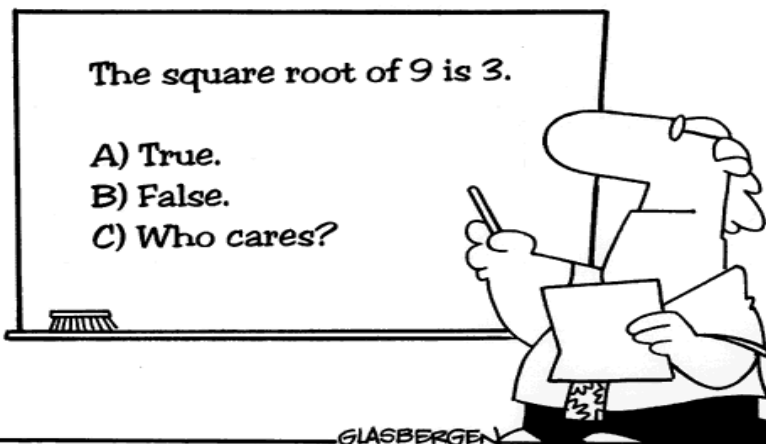
IV. False Claims Act (FCA) Overview (cont.)

H. Damages (cont.)

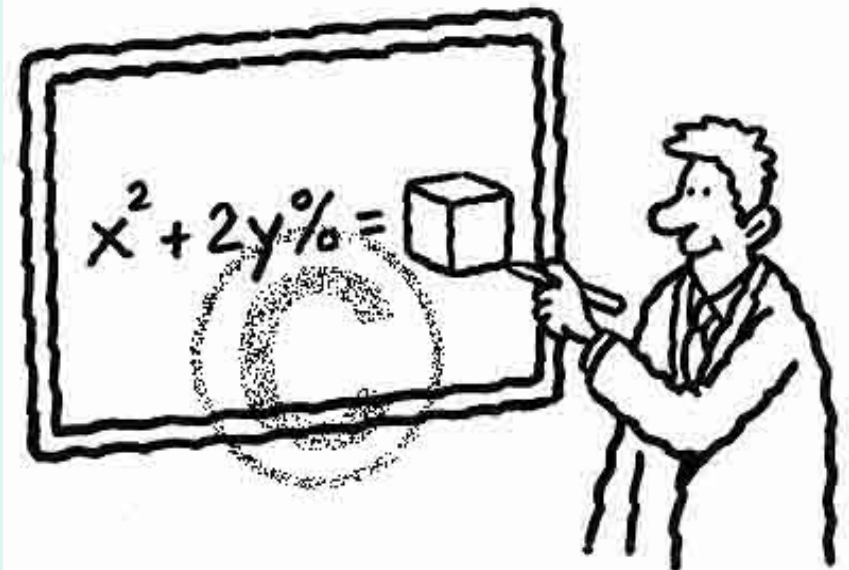
2. Calculation of damages

- a. Damages equal to what government paid less what government received
- b. Recovery of all amounts paid under contract. U.S. v. Mississippi Valley Generating Co., 364 US 520 (1961)
- c. Profits

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Many students actually look forward to Mr. Atwadder's math tests.



CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

I. Civil Penalties

- a. Claims on or after September 29, 1999: \$5,500 - \$11,000**
- b. Penalties are mandatory**

CIVIL REMEDIES

IV. False Claims Act (FCA) Overview (cont.)

J. Types of Cases

1. Mischarging
2. Product Substitution
3. Federal loans and insurance
4. Contract eligibility
5. Defective Pricing



CIVIL REMEDIES

V. Qui Tam Provisions of the False Claims Act (FCA)

A. Almost anyone can sue. But if the relator is not the original source he/she may not base suit solely on public knowledge obtained through government hearings, investigations or reports.

CIVIL REMEDIES

V. Qui Tam Provisions (cont.)

- B. Complaint is filed under seal by relator.
A written disclosure statement
(statement of evidence is provided to
the government.**
- C. The government has sixty (60) days to
decide whether to intervene in the
action. For good cause, the court may
extend the time in which to intervene.**

CIVIL REMEDIES

V. Qui Tam Provisions (cont.)

- D. If the government declines to intervene, the relator may proceed on with the action.**
- E. If the government intervenes then it takes the lead in the litigation. 31 U.S.C. § 3730(c)**
- F. The relator receives a percentage of the recovery: 15 – 25% if the government intervenes, 25 – 30% if the government declines to intervene. The percentage of recovery declines if relator participated in the fraud.**
- G. Whistle Blower Protection**

CIVIL REMEDIES

VI. Parallel Proceedings

- A. Matters pursue simultaneously by civil and criminal divisions against defendants who defrauded the government in its program or procurement.**
- B. Require coordinated developments by attorneys and agents**

CIVIL REMEDIES

VI. Parallel Proceedings (cont.)

C. Types of cases which may be appropriate for parallel proceedings:

- 1. Case involving fraud & federal procurement such as the contractor providing substandard part**
- 2. Case involving fraud on a federal program, grant or regulation, including environmental violations, HUD fraud, and minority-business enterprise fraud; and,**
- 3. Cases involving fraud in bulk mail service (e.g., underpaying postal fees)**

CIVIL REMEDIES

VI. Parallel Proceedings (cont.)

D. Communication and Coordination

- 1. Case meetings between civil and criminal divisions**
- 2. Civil and criminal overlapping investigative objectives**

E. Grand Jury vs. I.G. subpoenas

CIVIL REMEDIES

VI. Parallel Proceedings (cont.)

F. Prosecution Phase

- 1. When criminal AUSA drafts pleadings, it may be that certain counts and factual assertions are more helpful to the parallel matter than others.**
- 2. In terms of timing, a stay may be obtained in a civil case pending to a criminal action at the judge's discretion.**
- 3. Brady material which surfaces in civil discovery must be provided to the criminal AUSA for disclosure to the defense at the appropriate time.**

CIVIL REMEDIES

VI. Parallel Proceedings (cont.)

G. Resolution Phase and Global Settlement

- 1. In a criminal case, it is appropriate for the criminal AUSA to try to include in the factual basis for the pleas much information as can be helpful to the civil file.**
- 2. The government counsel is absolutely prohibited from trading criminal terms for civil advantage or vice versa.**

CIVIL REMEDIES

VI. Parallel Proceedings (cont.)

G. Resolution Phase and Global Settlement (cont.)

- 3. The grand jury rule of secrecy applies in full to global or parallel settlements and the rule cannot be waived by the defendant. The Civil AUSA may be asked to avoid the limitations of the rule by acquiring the necessary information (such as subpoenaed business records) directly from the defendant.**

CIVIL REMEDIES

VII. Referring a Case for ACE

- A. Intake Procedures**
- B. Statute of Limitations**
- C. Wrongful Acts**
- D. Damages**
- E. Analysis of Defendant's Financial Status**
- F. Evidence**

CIVIL REMEDIES

VII. Referring a Case for ACE (cont.)

G. Authority to Bring Civil Fraud Actions

Only the Attorney General has authority to initiate, compromise or close claims involving fraud against the U.S.

- 1. Civil Division, DOJ, has authority over fraud claims whenever single damages exceed \$1 million.**
- 2. Civil Division, DOJ, delegates cases automatically to the United States Attorneys Office when single damages are less than \$1 million.**

CIVIL REMEDIES

VIII. ACE Investigative Tools

- A. General Program Reviews and Audit**
- B. Inspector General Subpoena**
- C. Civil Investigative Demands (CIDs)**

31 U.S.C. § 3733

- 1. Government may seek documents, obtain written answers to interrogatories or take depositions.**
- 2. Must be in support of potential FCA suit.**
- 3. Must be signed by the Attorney General.**
- 4. Investigation done by “false claims investigators” (e.g., DOJ lawyers, etc.)**
- 5. Results may not be shared with agency.**

CIVIL REMEDIES

VIII. ACE Investigative Tools (cont.)

D. Grand jury materials, U.S. v. Sells Engineering, Inc., 463 US 418 (1983);
U.S. v. Baggot, 463 US 476 (1983)

1. Federal Rules of Criminal Procedure 6(e) limits a civil attorneys access to grand jury materials.

CIVIL REMEDIES

VIII. ACE Investigative Tools (cont.)

- 2. To obtain access, the government must show a particularized need such as to avoid injustice in another proceeding.**
 - a. The need for disclosure must outweigh the need for continued secrecy.**
 - b. The request must be limited to only those materials needed.**

CIVIL REMEDIES

VIII. ACE Investigative Tools (cont.)

- c. The government must show more than an inconvenience or a cost saving.**
- d. It is easier to obtain documents than testimony. Documents produced to a grand jury pursuant to a subpoena may not be suspect to Rule 6(e).**

CIVIL REMEDIES

IX. Conclusion



Remember, on a bad day you are almost never alone!